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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

NARDELL ULYSSES  
CARTER,

Petitioner,

vs.

LEE BACA, SHERIFF,

Respondent.

Case No. CV 11-3572-RSWL (RNB)

ORDER RE SUMMARY DISMISSAL  
OF ACTION WITHOUT PREJUDICE

15 On April 26, 2011, petitioner (who currently is incarcerated at California  
16 Correctional Training Facility in Soledad) filed a Petition for Writ of Habeas Corpus  
17 ("Pet.") herein. The Petition is directed to a 2010 conviction sustained by petitioner  
18 in Los Angeles County Superior Court. The sole claim alleged by petitioner is that  
19 the trial court erred in using prior convictions to enhance petitioner's sentence.

20 As a matter of comity, a federal court will not entertain a habeas corpus petition  
21 unless the petitioner has exhausted the available state judicial remedies on every  
22 ground presented in the petition. See Rose v. Lundy, 455 U.S. 509, 518-22, 102 S.  
23 Ct. 1198, 71 L. Ed. 2d 179 (1982). The habeas statute now explicitly provides that  
24 a habeas petition brought by a person in state custody "shall not be granted unless it  
25 appears that-- (A) the applicant has exhausted the remedies available in the courts of  
26 the State; or (B)(i) there is an absence of available State corrective process; or (ii)  
27 circumstances exist that render such process ineffective to protect the rights of the  
28 applicant." See 28 U.S.C. § 2254(b)(1). Moreover, if the exhaustion requirement is

1 to be waived, it must be waived expressly by the State, through counsel. See 28  
2 U.S.C. § 2254(b)(3). A federal court may raise the failure to exhaust issue sua sponte  
3 and may summarily dismiss on that ground. See Stone v. San Francisco, 968 F.2d  
4 850, 856 (9th Cir. 1992), cert. denied, 506 U.S. 1081 (1993); Cartwright v. Cupp, 650  
5 F.2d 1103, 1104 (9th Cir. 1982) (per curiam), cert. denied, 455 U.S. 1023 (1982); see  
6 also Granberry v. Greer, 481 U.S. 129, 134-35, 107 S. Ct. 1671, 95 L. Ed. 2d 119  
7 (1987).

8 Exhaustion ordinarily requires that the prisoner's contentions be fairly  
9 presented to the state courts, and be disposed of on the merits by the highest court of  
10 the state. See Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979). However, under  
11 the Ninth Circuit's holding and reasoning in Sherwood v. Tompkins, 716 F.2d 632  
12 (9th Cir. 1983), the federal exhaustion requirement also is not satisfied if the  
13 petitioner has post-conviction proceedings pending in state court.

14 In Sherwood, the petitioner was seeking habeas relief on the ground that he had  
15 been denied his right to appointed counsel and free transcripts. Although the  
16 petitioner's state appeal from his conviction still was pending, the petitioner (like  
17 petitioner here) arguably had exhausted his state remedies with respect to the  
18 particular claim being raised in his federal habeas petition. The Ninth Circuit held  
19 that the federal habeas petition nevertheless had to be dismissed for failure to exhaust  
20 state remedies:

21 "[E]ven were Sherwood to have exhausted all his state remedies  
22 with respect to the denial of his appointed counsel and free transcript  
23 request, that would not be enough to satisfy the requirements of 28  
24 U.S.C. §§ 2254(b) and (c). When, as in the present case, an appeal of a  
25 state criminal conviction is pending, a would-be habeas corpus  
26 petitioner must await the outcome of his appeal before his state remedies  
27 are exhausted, even where the issue to be challenged in the writ of  
28 habeas corpus has been finally settled in the state courts.

1           “As we explained in Davidson v. Klinger, 411 F.2d 746, 747 (9th  
2       Cir. 1969), even if the federal constitutional question raised by the  
3       habeas corpus petitioner cannot be resolved in a pending state appeal,  
4       that appeal may result in the reversal of the petitioner’s conviction on  
5       some other ground, thereby mootng the federal question.” Sherwood,  
6       716 F.2d at 634 (footnote and remaining citations omitted).

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8       Sherwood is still good law in the Ninth Circuit. See, e.g., Deere v. Superior Court of  
9       Cal., 330 Fed. App’x 693, 694 (9th Cir. 2009) (now citable for its persuasive value  
10      per Ninth Circuit Rule 36-3) (citing Sherwood for the proposition that “a federal  
11      habeas petition is premature when the petitioner’s direct criminal appeal is pending  
12      in state court”); Henderson v. Cavazos, 2010 WL 333234, \*1-\*2 (C.D. Cal. Jan. 31,  
13      2011); O’Shell v. Mayberg, 2009 WL 3061982, \*4 (S.D. Cal. Sept. 24, 2009).

14      Here, it appears from the face of the Petition (see ¶ 3) and the California  
15      Appellate Courts website confirms that petitioner’s direct appeal from the judgment  
16      of conviction remains pending. Thus, Sherwood compels dismissal of this action  
17      even though it also appears from the face of the Petition that petitioner has exhausted  
18      his state remedies with respect to his sentencing error claim.

19      IT THEREFORE IS ORDERED that this action be summarily dismissed  
20      without prejudice for failure to exhaust state remedies, pursuant to Rule 4 of the  
21      Rules Governing Section 2254 Cases in the United States District Courts.

22      LET JUDGMENT BE ENTERED ACCORDINGLY.

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24      DATED: May 9, 2011

RONALD S.W. LEW

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RONALD S.W. LEW  
SENIOR U.S. DISTRICT JUDGE

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26      Presented by:

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Robert N. Block  
United States Magistrate Judge